

JUN 02 2005

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MURs 5489, 5581, 5513, and 5533

SENSITIVE

MUR 5489¹

DATE COMPLAINT FILED: July 22, 2004
DATE OF NOTIFICATION: July 28, 2004
DATE ACTIVATED: October 14, 2004

EXPIRATION OF STATUTE
OF LIMITATIONS: June 27, 2009

COMPLAINANTS: Ellen Lowe
Citizens for Responsibility and Ethics in Government

RESPONDENTS: Bush-Cheney '04, Inc. and David Herndon, in his official capacity as treasurer
Citizens for a Sound Economy, Inc. n/k/a FreedomWorks, Inc.
Russ Walker
Nader for President 2004 and Carl M. Mayer, in his official capacity as treasurer²
Steve Schmidt
Oregon Family Council
Michael White
Tim Nashif
Oregon Republican Party and
Charles Oakes, in his official capacity as treasurer³
Kevin Mannix

¹ MUR 5475, the first matter filed, presented a separable issue about the Nader Committee's office space; the Commission disposed of that matter on February 10, 2005, voting to sever the Amended Complaint allegations overlapping with the MUR 5489 Oregon allegations and add these allegations and respondents to that matter.

² Complainant identified Clarissa Peterson as a respondent since she was the treasurer of Nader for President 2004 when the complaint was filed. Carl M. Mayer is the current treasurer of Nader for President 2004. See Nader for President 2004, Amended Statement of Organization, dated November 24, 2004. Accordingly, we have named Mr. Mayer, in his official capacity as treasurer, as a respondent in this matter.

³ Complainant identified Vance Day as treasurer, since he was the treasurer of the Oregon Republican Party when the complaint was filed. Charles Oakes is the current treasurer of the Oregon Republican Party. Accordingly, we have named Mr. Oakes, in his official capacity as treasurer, as a respondent in this matter.

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MUR 5581

DATE COMPLAINT FILED: October 25, 2004
DATE OF NOTIFICATION: November 1, 2004
DATE ACTIVATED: November 8, 2004

EXPIRATION OF STATUTE
OF LIMITATIONS: June 1, 2009

COMPLAINANT:

Daniel Schneider

RESPONDENTS:

Michigan Republican State Central Committee and
Richard M. Gabrys, in his official capacity as treasurer
Greg McNeilly
Oregon Family Council
Citizens for a Sound Economy
Norway Hill Associates, Inc.
David Carney
Choices for America, LLC

Nader for President 2004 and Carl M. Mayer, in his
official capacity as treasurer⁴

MUR 5513

DATE COMPLAINT FILED: August 10, 2004
DATE OF NOTIFICATION: August 18, 2004
DATE ACTIVATED: October 14, 2004

EXPIRATION OF STATUTE
OF LIMITATIONS: August 10, 2009

COMPLAINANT:

New Hampshire Democratic State Committee

⁴ Complainant in MUR 5581 identified Niyi Shomade as a respondent, listing her as the treasurer of "Nader/Camejo 2004." However, the complaint clearly refers to Nader for President 2004. Accordingly, we have named Nader for President 2004 and Carl M. Mayer, in his official capacity as treasurer, as a respondent in this matter. Nader for President 2004 and Carl M. Mayer submitted a response in this matter.

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RESPONDENTS:

Norway Hill Associates, Inc.
Choices for America, LLC
Nader for President 2004 and Carl M. Mayer, in his
official capacity as treasurer

MUR 5533

DATE COMPLAINT FILED: September 13, 2004
DATE OF NOTIFICATION: September 20, 2004
DATE ACTIVATED: October 14, 2004

EXPIRATION OF STATUTE
OF LIMITATIONS: June 1, 2009

COMPLAINANT:

Mark Brewer

RESPONDENTS:

Michigan Republican State Central Committee and
Richard M. Gabrys, in his official capacity as treasurer
Nader for President 2004 and Carl M. Mayer, in his
official capacity as treasurer

**RELEVANT STATUTES AND
REGULATIONS:**

2 U.S.C. §§ 431(8), (9)
2 U.S.C. § 441a
2 U.S.C. § 441b
11 C.F.R. § 100.134
11 C.F.R. § 109.21
11 C.F.R. § 114.7

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

STATE AGENCIES CHECKED:

Commonwealth of Virginia State Corporation
Commission

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INTRODUCTION

In this First General Counsel's Report, we address four complaints involving various activities with respect to alleged Republican efforts to place Ralph Nader on state ballots during the 2004 Presidential election campaign. Specifically, the complaints address such efforts in Oregon (MUR 5489, 5581), New Hampshire (MUR 5513, 5581), and Michigan (MUR 5533, 5581). Due to the similarity of the allegations, we present the matters and our recommendations as to them in a single report in order to facilitate the Commission's considerations and to provide a more comprehensive view of the various matters. However, because the complained of activities in these states present different factual and legal issues, we analyze each state fact pattern separately.

This Office recommends a "no RTB" and "no action" disposition of the Oregon pattern and respondents, and recommends the Commission find reason to believe with respect to the New Hampshire, and Michigan fact patterns and respondents. We premise our recommendations on our determination that the delivery of ballot-access petitions should be viewed as conduct and the provision of goods and services and, thus, as an in-kind contribution. We do not view the petitions as independent expenditures. Independent expenditures are defined as expenditures for communication and the delivery of these petitions did not constitute communication and, thus, the expenses associated with them did not constitute independent expenditures. Because we view submitting petitions in support of Nader's appearance on the ballot to be an in-kind contribution to the Nader Committee, we analyze separately the varying degrees to which the Nader Committee can be said to have knowingly accepted such in-kind contributions. Below, we summarize briefly the bases for our recommendations.

➤ Oregon

○ Citizens for a Sound Economy and employees: No RTB. CSE is a membership organization; phone calls to its members to attend a Nader petition-signing rally were internal communications; allegation that CSE separately collected petition signatures is unsupported and denied.

○ Oregon Family Counsel and employees: Take no action and close. OFC is a smaller operation and not a membership organization; its calls to "members" are not coordinated communication because 100 phone calls are neither "electioneering communications" nor "public communications"; dismissal because *de minimis* corporate expenditure.

○ Oregon Republican Party and employees, Nader Committee, and Bush-Cheney Committee and employees: No RTB. No evidence that these committees were involved.

➤ New Hampshire

○ Norway Hill, David Carney, Lauren Carney, and James McKay: Knowing and willful RTB. Carney used his company (Norway Hill) to hire temporary workers for petition-gathering. Nader Committee conceded in-kind contribution, so RTB based on corporate advance by Norway, Carney and the other corporate principals, although later reimbursed (and recharacterized) as individual in-kinds. To provide notice of the potential seriousness of the violations, we analyze apparent violations as K&W.

○ Nader Committee: Take no action at this time pending investigation of Norway Hill activity.

○ Choices for America: No RTB.

➤ Michigan

○ Michigan Republican State Central Committee: RTB. MRSC spent money to collect nearly 50,000 petition signatures submitted to the Michigan Secretary of State on behalf of the Nader Committee. We analyze as an in-kind contribution on behalf of Nader Committee with questions remaining about costs, particularly legal expenses.

○ Nader Committee: Take no action at this time. Available information suggests that while the Nader Committee knew of MRSC's efforts and used MRSC's signatures to qualify for the ballot, the Nader Committee believed MRSC's efforts were volunteer.

○ Greg McNeilly: No RTB.

1
2 In this report, we also propose severing the various fact patterns into individual MURs to
3 avoid complications going forward. On February 10, 2005, the Commission voted to sever the
4 amended complaint in MUR 5475 (Oregon) from the allegations in the complaint (Citizen
5 Works), and to close the file. The Oregon respondents and allegations were transferred to MUR
6 5489, which solely addressed the Oregon fact pattern. However, MUR 5581 also contains
7 allegations with regard to the Oregon fact pattern. MURs 5581 and 5513 both address the New
8 Hampshire fact pattern, while MURs 5533 and 5581 both address the Michigan fact pattern.

9
10 The following chart illustrates the overlap in the pending matters:

MUR	OREGON	NEW HAMPSHIRE	MICHIGAN
5489	√		
5513		√	
5533			√
5581	√	√	√

11
12 We recommend severance so that each of the fact patterns is present in only one MUR,
13 which would allow the Commission to close out a MUR when it resolves the allegations in the
14 fact pattern. For example, the Oregon respondents were subjects of the complaints in MUR 5489
15 and 5581 We are making
16 dispositive recommendations (no reason to believe and no action) with respect to the activity in
17 Oregon. Thus, we recommend in MUR 5581 severing the Oregon allegations and respondents
18 from that MUR, adding them to MUR 5489, and closing the file in MUR 5489. Similarly, we
19 will sever the New Hampshire allegations and respondents from MUR 5581 and add them to

MURs 5489, 5533, 5513, and 5581
First General Counsel's Report

- 1 MUR 5513; sever the Michigan allegations and respondents from MUR 5581 and add them to
2 MUR 5533;

- 3 The formal recommendations at the close of this combined First General Counsel's
4 Report incorporate these severance proposals. The following chart illustrates the result if the
5 Commission approves these proposals:

MUR	OREGON	NEW HAMPSHIRE	MICHIGAN
5489	√		
5513		√	
5533			√
5581			

OREGON FACT PATTERN

MURs: 5489 and 5581
Respondents: Nader for President 2004 and
Carl M. Mayer, in his official capacity as treasurer⁵
Bush-Cheney '04, Inc. and
David Herndon, in his official capacity as treasurer
Steve Schmidt
Oregon Family Council
Michael White
Tim Nashif
Oregon Republican Party and
Charles Oakes, in his official capacity as treasurer
Kevin Mannix
Citizens for a Sound Economy, Inc.
n/k/a FreedomWorks, Inc.
Russ Walker

I. INTRODUCTION

Complainants allege that in an effort to place Ralph Nader on the Oregon ballot during the 2004 Presidential election cycle, two organizations, Citizens for a Sound Economy n/k/a FreedomWorks, Inc. ("CSE")⁶ and the Oregon Family Council ("OFC"), coordinated expenditures for phone banking and petition circulation costs with Bush-Cheney '04, Inc. ("Bush Committee"), Nader for President 2004 ("Nader Committee"), and/or the Oregon Republican Party ("ORP"). Complainants further allege that if not coordinated, CSE and OFC may have made prohibited corporate expenditures.

The available information indicates that CSE made phone calls urging individuals to attend a June 2004 rally to sign petitions to help Nader get on the Oregon ballot (the "Nader

⁵ See footnote 2.

⁶ Citizens for a Sound Economy is now known as "FreedomWorks, Inc.," and is registered for tax purposes as a § 501(c)(4) corporation.

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1 rally”), but that these phone calls fall within the exception to the definition of “expenditure” for
2 internal communications made by a membership organization. 11 C.F.R. § 100.134(a).
3 Moreover, no information suggests that CSE separately circulated any petitions on behalf of the
4 Nader Committee. Accordingly, we recommend the Commission find no reason to believe CSE
5 violated the Federal Election Campaign Act of 1971, as amended (“the Act”) in connection with
6 this matter. OFC also made calls to its donors urging them to attend the Nader rally. While its
7 calls do not fall within the same exception, OFC’s calls do not meet the definition of a
8 coordinated expenditure, and due to the small number of calls and *de minimis* expense involved,
9 we recommend the Commission take no further action with respect to OFC. Finally, the Bush
10 Committee, Nader Committee, and ORP have denied any involvement with CSE’s or OFC’s
11 efforts, and complainants have provided no probative evidence to support their allegations. As
12 such, we recommend the Commission find no reason to believe these respondents violated the
13 Act in connection with this matter.

14 II. FACTUAL AND LEGAL ANALYSIS

15 A. Citizens for a Sound Economy

16 Complainants allege, *inter alia*, that CSE violated the Act by operating a phone bank and
17 gathering petitions in an effort to ensure that Ralph Nader appeared on the Oregon ballot.

18 1. Phone bank

19 Complainants allege that CSE used corporate funds to pay for a June 2004 phone bank
20 urging individuals to attend the Nader rally. According to the various complaints, the script for
21 the phone bank stated in part, “In this year’s presidential race, Ralph Nader could peel away a lot
22 of Kerry support in Oregon, but he has to get on the ballot first. He will make it if at least 1,000
23 people show up this Saturday . . . and sign a petition to certify his candidacy.” Citizens for

1 Responsibility and Ethics in Washington ("CREW") Complaint at Ex. B.⁷ Together, the
2 complaints allege that if the phone bank was coordinated with either the Bush or Nader
3 Committee, the costs associated would be a prohibited in-kind contribution to those committees
4 in violation of 2 U.S.C. § 441b(a).⁸ If there was no coordination, complainants allege that the
5 cost of the phone bank was a prohibited independent expenditure. *See* 2 U.S.C. § 441b(a).

6 The costs associated with CSE's phone bank do not appear to constitute a contribution or
7 expenditure because the calls were made to CSE members. The Act prohibits corporations from
8 making contributions or expenditures from their general treasury funds in connection with any
9 election of any candidate for Federal office. 2 U.S.C. § 441b(a).⁹ However, this general
10 prohibition contains an exception that permits incorporated membership organizations to
11 communicate with their members on "any subject," including express advocacy
12 communications.¹⁰ *See* 2 U.S.C. § 431(9)(B)(iii); 11 C.F.R. § 100.134(a). Such communications
13 to members may involve election-related coordination with candidates and political committees.
14 *See* 11 C.F.R. §§ 114.3(a)(1), 114.7(h).

⁷ There is some discrepancy in the various scripts submitted by complainants. The CREW Complaint attaches a CSE Press release quoting the script. Complainant in MUR 5489 quotes a different script, which states in part, "I am calling because we have a chance to stop John Kerry from winning in Oregon. . . . Ralph Nader is undoubtedly going to pull some very crucial votes from John Kerry, and that could mean the difference in a razor-thin Presidential election." Complaint in MUR 5489 at 3, ¶6 (this script apparently appeared in a *Hotline* article attached to the complaint at Ex. B). According to the complaint in MUR 5489, CSE edited its script before including it in its press release to remove the express advocacy references to defeating John Kerry. Complaint in MUR 5489 at 4, ¶11.

⁸ The CREW Complaint alleges that the Nader Committee may have been aware that these telephone calls were being made. CREW Complaint at 5, ¶17. The complaint in MUR 5489 states that the phone bank was unlawfully coordinated with both the Bush and Nader Committees. Complaint in MUR 5489 at 7, ¶27.

⁹ Although certain nonprofit corporations may make independent expenditures, CSE does not claim to be such a corporation. *See* 11 C.F.R. § 114.10(c); *see also* *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("MCFL").

¹⁰ Commission Regulations specifically allow corporations, labor unions, and membership organizations to operate phone banks to communicate with their members. 11 C.F.R. § 114.3(c)(3).

1 CSE appears to qualify as a membership organization under 11 C.F.R. § 100.134(e):

- 2 • According to its Amended Articles of Incorporation (“the Articles”), CSE is a
3 § 501(c)(4) organization, formed primarily to “educate and instruct consumers,
4 business owners, policymakers and the general public about the value and
5 operation of a free economy.” Attachment 1 at 1. CSE’s corporate filings in
6 Virginia, Attachment 2, reflect that it is a corporation without capital stock. *See*
7 11 C.F.R. § 100.134(e).
- 8
- 9 • The Articles state that “[t]he corporation shall have members as set forth in the
10 bylaws.” Attachment 1 at 3. These members have certain voting rights with
11 respect to the election of CSE’s Board of Directors, *see* Attachment 3 at 1, which,
12 in turn, administers the organization. *See* 11 C.F.R. § 100.134(e)(1).
- 13
- 14 • The Articles refer to CSE’s bylaws for membership information. Attachment 1 at
15 3. *See* 11 C.F.R. § 100.134(e)(2).¹¹
- 16
- 17 • CSE’s Articles of Incorporation are publicly available and, thus, available to
18 members. *See* 11 C.F.R. § 100.134(e)(3).
- 19
- 20 • CSE’s website solicits the public to join at various membership levels (or
21 “circles”). FreedomWorks, Giving Circles,
22 <http://www.freedomworks.org/support/circles.php> (visited Jan. 24, 2005); *see*
23 11 C.F.R. § 100.134(e)(4).
- 24
- 25 • Upon joining, members receive a membership card and various other benefits,
26 depending on their “circle.” FreedomWorks, Giving Circles,
27 <http://www.freedomworks.org/support/circles.php> (visited Jan. 24, 2005); *see*
28 11 C.F.R. § 100.134(e)(5).
- 29
- 30 • Though the activity at issue here—attempting to place a candidate on a state
31 ballot—is intended to influence an election, given the limited scope of the
32 activity, we do not recommend an investigation into whether and to what extent
33 CSE’s *primary* purpose is influencing Federal elections. *See* 11 C.F.R.
34 § 100.134(e)(6).
- 35

36 The available information suggests that the phone calls in question were made only to

37 CSE members. CSE asserts that its phone calls “were made to members of CSE . . .” CSE

38 Response in MUR 5489 at 2; CSE Response in MUR 5581 at 2. CSE supports this statement

39 with an affidavit from Russ Walker, the group’s Northwest Director (“Walker Affidavit”), which

¹¹ The bylaws do not appear to be publicly available.

1 states, "CSE only used the telephone numbers of its members in Oregon to make the calls," and
2 that the total cost of the calls was approximately \$400. See Walker Affidavit, CSE Response to
3 CREW Complaint and CSE Response in MURs 5489 and 5581.¹² The CREW Complaint
4 appears to acknowledge that CSE made calls only to its members, stating, "CSE provided a
5 script that CSE employees used to make telephone calls to CSE members urging them to sign a
6 petition to put Ralph Nader on the Oregon ballot." CREW Complaint at 3, ¶¶4, 10.¹³

7 In conclusion, the cost of CSE's phone calls does not constitute a contribution or
8 expenditure under the Act. Accordingly, we recommend the Commission find no reason to
9 believe CSE, Russ Walker, the Bush Committee, or the Nader Committee violated the Act with
10 respect to CSE's phone calls.¹⁴

11 2. Petition-gathering

12 The complaint in MUR 5489 states that in addition to its phone bank efforts, CSE "has
13 announced its plan to collect signatures on Ralph Nader's petitions" Complaint in MUR

¹² Though we refer to the "Walker Affidavit," the affidavits submitted in response to the CREW Complaint and to the complaint in MUR 5489 are slightly different. The affidavit in MUR 5489 is responsive to complainant's allegation as to petition-gathering, while the CREW Complaint made no similar allegation. The affidavits are the same in all other material respects.

¹³ In contrast, the complaint in MUR 5489 alleges that CSE's calls were made to "state voters," apparently suggesting that the calls were not made only to members. Complaint in MUR 5489 at 2, ¶4. However, complainant cites only a newspaper article stating that CSE and OFC "have been calling members." CREW Complaint, Attachment A at 1. Similarly, complainant in MUR 5581 alleges that calls were made to CSE members and "friends," but cites the same article attached to the CREW complaint—an article that nowhere contains the word "friends." A CSE press release attached to the CREW Complaint does state, ". . . Oregon CSE members feel that having Nader on the ballot helps illuminate the strong similarities between the uber-liberal Nader and John Kerry. That's why they've been making calls to their friends to sign a petition to get Nader on the ballot" CREW Complaint, Attachment B (emphasis added). However, absent any additional information, we cannot assume that "their friends," in this context, does not refer to other CSE members.

¹⁴ Contrary to complainant's assertions in MUR 5489 (Count 5), because CSE's calls were not made to the general public, they did not require a disclaimer. See 11 C.F.R. § 110.11(a); see also 11 C.F.R. § 100.26. Even though the phone calls were made to members, if the cost of the calls exceeded \$2,000 and the calls expressly advocated the election or defeat of a clearly identified candidate, CSE would have been obligated to report such costs to the Commission. 11 C.F.R. § 100.134(a). However, as discussed above, the cost of the calls appears to have been approximately \$400.

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1 5489 at 4, ¶13. In support of this statement, the complaint cites two newspaper articles in which
2 Russ Walker reportedly stated that the group “talked about launching this (petition drive)
3 ourselves . . . We are going to do something. Probably, at a minimum, we’d ask members to
4 circulate the petition and help get Nader on the ballot.” Complaint in MUR 5489 at Ex. D. The
5 Walker Affidavit, however, states that “CSE has not circulated any petitions or collected any
6 signatures for the Nader campaign.” *Id.* at Attachment 1, ¶7. Because complainant presented no
7 evidence that CSE actually circulated petitions, but only that it discussed the possibility, and
8 considering Walker’s express denial and the denials by the Nader and Bush Committees, we
9 recommend the Commission find no reason to believe CSE violated the Act by circulating
10 nominating petitions and no reason to believe the Nader or Bush Committee (or Bush Committee
11 spokesman Steve Schmidt) violated the Act by coordinating petition-circulation activity with
12 CSE.

13 **B. Oregon Family Council and the Oregon Republican Party**

14 Complainants allege that, like CSE, the Oregon Family Council made phone calls urging
15 individuals to help place Ralph Nader on the Oregon ballot and that funds spent on the calls are a
16 prohibited in-kind contribution. CREW Complaint at 3-4; Complaint in MUR 5581 at 7-10.¹⁵
17 The CREW Complaint further alleges that the Oregon Republican Party encouraged OFC to

¹⁵ Complainant in MUR 5581 cites a newspaper article allegedly showing one of the OFC scripts:

We’re calling about a great opportunity for you to help President Bush. It’s a little unconventional, but . . . Ralph Nader, an environmental and anti-war activist, is holding an open rally this weekend to try to obtain 1,000 signatures from registered Oregon voters to qualify for the November ballot in Oregon. We don’t think that many people will show up. If Ralph Nader gets on the ballot, he would pull thousands of liberal votes that would otherwise go to Kerry and perhaps cause President Bush to lose the election. Would you like to take this opportunity to help President Bush by coming out Saturday night to make sure Ralph Nader gets on the ballot? The event is Saturday night at Benson High School from 5-7 p.m.

Complaint in MUR 5581 at 8 ¶ 28; *see also* CREW Complaint at Exhibit C.

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1 make calls to get Nader on the ballot, and thus “illegally conspired with OFC to evade the
2 prohibition on the use of soft money to pay for public communications.” CREW Complaint at 5-
3 6. The CREW Complaint also identifies as respondents: OFC Political Director, Tim Nashif;
4 OFC Executive Director, Michael White; and ORP Chairman, Kevin Mannix.

5 OFC is a section 501(c)(4) “non-profit public benefit corporation dedicated to informing
6 its membership about political issues that impact religious Christians.” OFC Response in MUR
7 5475 at 2. OFC admits that it arranged to have calls placed to its “members” informing them of
8 the Nader rally. OFC Response in MUR 5475 at 2. According to OFC, its Executive Director,
9 Michael White, received a call from “either Citizens for a Sound Economy [or] the Oregon
10 Republican Party about increasing turnout at a [Nader] rally” *Id.* In response to the call,
11 White and OFC Communications Director Nicholas Graham drafted a script informing members
12 of the Nader rally, created a list of Portland-area members, and programmed the group’s
13 automated call system to make “[a]pproximately 100 calls” to those members. *Id.* at Exhibits 1
14 and 2. In their affidavits, White and Graham assert that they were not paid for their time in
15 writing the script for the calls, editing the donor list to include only Portland-area “members,” or
16 programming the automated call system to dial the approximately 100 OFC members who
17 received the call. *Id.*

18 In response to the allegations, OFC argues that “[p]hone calls by a non-profit, public
19 benefit corporation to its members constitutes an exempt communication under the Section 431
20 definition of ‘expenditure,’” but at the same time concedes that it “is not a membership
21 organization.” *Compare* OFC Response in MUR 5475 at 4 with 2 n.1 (explaining that it “has a
22 number of individuals it loosely terms ‘members’—i.e. donors and activists”). Because OFC is
23 not a membership organization within the meaning of 11 C.F.R. §§ 100.134(e) and 114.1(e)(1),

1 the cost of its phone calls is not exempt from the definition of "expenditure" as an internal
2 membership communication. *See* 2 U.S.C. § 431(9)(B)(iii); 11 C.F.R. § 100.134(a).

3 Despite the fact that it is not a membership organization, OFC does not appear to have
4 violated the Act by coordinating its phone calls with any committee. Specifically, OFC's phone
5 calls do not qualify as a "coordinated communication" under 11 C.F.R. § 109.21. Under
6 Commission regulations, to be considered "coordinated" a communication must satisfy one or
7 more of the four content standards set forth at 11 C.F.R. § 109.21(c), *and* one or more of the six
8 conduct standards set forth at 11 C.F.R. § 109.21(d).

9 OFC's phone calls do not satisfy any of the content standards. The phone calls at issue
10 were not an electioneering communication under 11 C.F.R. § 109.21(c)(1) because they were not
11 a "broadcast, cable, or satellite communication" as required by 11 C.F.R. § 100.29(a). Nor
12 would the 100 automated phone calls satisfy any of the remaining three content standards
13 because they did not constitute a "public communication." 11 C.F.R. §§ 109.21(c)(2) – (4).¹⁶
14 Thus, the cost of the calls cannot be considered a coordinated expenditure.

15 In light of the minimal amount of funds involved—likely including only the cost of the
16 approximately 100 local calls OFC placed to its "members"—we do not analyze separately
17 whether the cost of OFC's phone calls constitutes an independent expenditure and, if so, whether
18 OFC would meet the definition of a qualified nonprofit corporation, exempt from the Act's
19 prohibition against corporate expenditures. *See* 11 C.F.R. § 114.10(c); *see also* *MCFL*, 479 U.S.
20 at 262-63. Accordingly, we recommend the Commission make no determination whether or not
21 there is reason to believe OFC (or its Directors, Tim Nashif and Michael White) violated

¹⁶ The term "public communication" includes communications to the general public by means of telephone banks, 11 C.F.R. § 100.26, but "telephone bank" is defined as "more than 500 calls of an identical or substantially similar nature" 2 U.S.C. § 431(24); 11 C.F.R. § 100.28.

1 2 U.S.C. § 441b by making prohibited independent expenditures. Because OFC's phone calls
2 did not constitute a coordinated expenditure, we recommend the Commission find no reason to
3 believe that the Nader Committee, the Bush Committee, or the ORP (or its Chairman, Kevin
4 Mannix) violated the Act by accepting prohibited contributions. 2 U.S.C. § 441b.

5

6

NEW HAMPSHIRE FACT PATTERN

MURs: 5513 and 5581
Respondents: Nader for President 2004 and
Carl M. Mayer, in his official capacity as treasurer
Norway Hill Associates, Inc.
David Carney
H. Lauren Carney
James McKay
Choices for America, LLC

I. INTRODUCTION

Complainants allege that Norway Hill Associates, Inc. ("Norway Hill") and Choices for America, LLC ("Choices for America") made prohibited corporate or excessive contributions in connection with their efforts to gather petition signatures in order to ensure Ralph Nader's appearance on the New Hampshire ballot during the 2004 Presidential election cycle. 2 U.S.C. §§ 441a(a), 441b(a). Complainants allege that amounts spent on these efforts constitute prohibited in-kind contributions to the Nader Committee. 2 U.S.C. §§ 441a(f), 441b(a). For the reasons discussed below, we recommend the Commission find reason to believe Norway Hill knowingly and willfully violated the Act by making prohibited in-kind corporate contributions to the Nader Committee. We further recommend the Commission find reason to believe Norway Hill's principals, David Carney, H. Lauren Carney, and James McKay, knowingly and willfully violated the Act by consenting to the making of those in-kind corporate contributions. Because none of the available information indicates that Choices for America had any involvement with the facts at issue here, we recommend the Commission find no reason to believe that the organization violated the Act in connection with this matter. Finally, we recommend the Commission take no action at this time as to the Nader Committee.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Background**

3 The available information indicates that Norway Hill made contributions to the Nader
4 Committee when it used its general treasury funds to pay for the costs associated with its
5 petition-gathering efforts. According to complainants, Choices for America, "a Missouri-based
6 nonprofit organization," approached David Carney, a Republican political consultant and
7 principal of Norway Hill, a New Hampshire-based "campaign and issue management firm," to
8 gather petition signatures in support of Ralph Nader's appearance on the New Hampshire
9 ballot.¹⁷ Carney was reported in the press as stating that in response to Choices for America's
10 request, Norway Hill hired "about 30 people" to gather signatures "at malls and fairs and all
11 kinds of places." *Id.* Among other places, Norway Hill reportedly paid temporary workers to
12 collect signatures outside a rally for President Bush. Supplemental Complaint in MUR 5513 at
13 Exhibit A.¹⁸

14 Though Carney initially stated that Choices for America hired Norway Hill to collect
15 signatures, it appears that Choices for America had no connection to David Carney or Norway
16 Hill. In its response, Choices for America states:

¹⁷ Complainants in both MURs 5513 and 5581 cite an August 10, 2004 Manchester Union Leader article as describing the relevant facts. See John DiStasio, *Names Sought to Get Nader on Ballot*, Manchester Union Leader, August 10, 2004 (Attached to Complaint in MUR 5513 and to Supplemental Complaint in MUR 5513 at Exhibit C).

¹⁸ Complainant in MUR 5581 includes a script allegedly used by temporary workers gathering signatures outside the Bush rally:

Approach: "Excuse me sir/miss, etc. I was wondering if you could take a second to help President Bush?"

Follow through: "I am collecting signatures to get Ralph Nader on the ballot."

Persuasion: "In 2000 Nader got almost 30,000 votes – without his presence Al Gore would be president today."

1 Choices for America LLC does not have, and has not in the past
2 had either a contractual or working relationship with Norway Hills
3 Associates Incorporated. Choices for America LLC has no
4 knowledge about Norway Hills Association Incorporated [sic].
5 Choices for America LLC has not paid Norway Hills Incorporated
6 for any services, as it has not contracted with Norway Hills for any
7 service, and does not currently intend to do so in the future.
8

9 Choices for America Response in MUR 5513. Indeed, despite his reported comments to the
10 press, Carney appears to have recanted his original contention that Choices for America was
11 involved at all. In his response to the complaint, Carney states, "our firm was hired by
12 individuals to conducted (sic) ballot access activities on behalf of the Nader for President
13 Campaign. Those individuals were billed for our firm's services and have subsequently paid for
14 those services using personal funds." Carney Response in MUR 5513. However, the
15 "individuals" Carney refers to are himself, his wife, and their business partner—not Choices for
16 America. Thus, Carney argues that he and the other Norway Hill principals hired their own
17 company, set the rates for its services, and then billed themselves for its work.

18 In its response, the Nader Committee clarifies the otherwise confusing chain of events.
19 The Nader Committee states that it "accepted the services of an individual named David Carney
20 to circulate petitions," but assumed Carney was a volunteer using his own time to assist the
21 campaign. Nader Committee Response in MUR 5513 at 2. The Nader Committee states that it
22 "was unaware that Mr. Carney had hired Norway Hill," but learned from the August 10, 2004
23 Manchester Union article submitted by complainant that Carney had used his business to
24 circulate petitions. *Id.*

25 The Nader Committee claims that upon reading the article, campaign manager, Theresa
26 Amato, and counsel, Bruce Afran, telephoned Carney to ask whether he or his company had paid
27 individuals to circulate petitions. *Id.* Carney allegedly stated that he "hired Norway Hill

1 Associates to gather petitions for the Nader/Camejo campaign in New Hampshire.” *Id.* Counsel
2 states that he told Carney to submit an accounting of the costs to the Committee because, “such
3 contributions, depending on the amount, could be a surplus contribution requiring reimbursement
4 by the campaign.” *Id.*

5 On September 14, 2004, Norway Hill submitted an invoice for \$265.05 to the Nader
6 Committee purporting to cover all of the expenses incurred by Norway Hill in connection with
7 its signature gathering efforts. *See* Attachments to the Nader Committee’s Response in MUR
8 5513. The invoice reflects \$6,265.05 in total costs for “signature collection,” “postage,” and
9 “printing,” and \$6,000 in credits. The credits are listed as three \$2,000 payments to Norway Hill
10 from: David Carney; his wife and Norway Hill partner, H. Lauren Carney (“Lauren Carney”);
11 and Norway Hill “owner,” James McKay. The invoice states that the credit amounts were paid
12 from “personal funds.” *Id.* In its September Monthly Report, the Nader Committee reported the
13 \$6,000 amount as three \$2,000 in-kind contributions from David Carney, Lauren Carney, and
14 James McKay.¹⁹ In a subsequent report, the Committee reported a \$265.05 disbursement to
15 Norway Hill for “printing & copying.”²⁰ FEC Disclosure Report, Nader for President 2004
16 Twelve Day Pre-General Report.

¹⁹ Though the checks to Norway Hill from David Carney, Lauren Carney, and James McKay are dated September 10, 2004, the Nader Committee reports receiving the contributions (and making the concomitant disbursement for “in-kind signatures, printing, postage”) on August 10, 2004, the date of both the complaint in MUR 5513 and the Manchester Union Leader article discussed *supra*. This date apparently reflects the date the Nader Committee acknowledged receiving the benefit of the in-kind contributions.

²⁰ It is unclear why the Nader Committee reported the purpose of this \$265.05 disbursement as “printing & copying” when the invoice was for “signature collection,” “postage,” and “printing.” However, because the Nader Committee reported the remaining \$6,000 as in-kind contributions for “signatures, printing, postage,” we do not make any recommendations with respect to the Nader Committee for a possible violation of 2 U.S.C. § 434(b) for failing adequately to disclose the purpose of the disbursement.

B. Analysis

The Nader Committee has admitted that Norway Hill's efforts constituted an in-kind contribution. Nader Committee Response in MUR 5513 at 2. The Act prohibits corporations from making contributions or expenditures in connection with federal elections and prohibits any officer or director of any corporation from consenting to any contribution or expenditure by the corporation. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(e).²¹ The Act's definition of contribution includes corporate advances. 2 U.S.C. § 431(8)(A)(i); *see also* 2 U.S.C. § 431(9)(A)(i). An in-kind contribution is "anything of value," including the provision of goods or services without charge. 2 U.S.C. § 431(8)(A)(i); *see also* 11 C.F.R. § 100.52(d)(1).

The available facts indicate that Norway Hill used general treasury funds to pay for its efforts on behalf of the Nader Committee. These costs appear to include hiring a temporary staffing agency to provide individuals to solicit signatures,²² and may have included a direct mail effort.²³ Norway Hill provided these goods and services without charge to the Nader Committee, and thereby made a prohibited corporate in-kind contribution. 2 U.S.C. § 431(8)(A)(i). The subsequent reimbursement by David Carney, Lauren Carney, and James McKay to Norway Hill does not cure that violation.

²¹ Amounts spent on promoting a candidate for the general election ballot "by seeking signatures on nominating petitions" are expenditures. Advisory Opinion 1994-5 (White) ("[E]xpenditures to influence your election would include amounts you spend . . . to promote yourself for the general election ballot by seeking signatures on nominating petitions").

²² Press reports state that Norway Hill hired Adecco, Inc., a temporary staffing agency, to provide individuals to solicit signatures outside a rally for President Bush. Joe Adler, *Dems Urge FEC Probe of Nader Drive*, Seacoast Online, August 12, 2004.

²³ Norway Hill indicates that \$1,749.97 of its invoice was for "postage." Invoice attached to Nader Response in MUR 5513.

Moreover, Norway Hill's apparent violations may have been knowing and willful.

2 U.S.C. § 437g(a)(5)(B). The phrase knowing and willful indicates that "actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law."

H.R. Rpt. 94-917 at 4 (Mar. 17, 1976) (*reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976 at 803-4 (Aug. 1977)); *see also National Right to Work Comm. v. FEC*, 716 F.2d 1401, 1403 (D.C. Cir. 1983) (citing *AFL-CIO v. FEC*, 628 F.2d 97, 98, 101 (D.C. Cir. 1980) for the proposition that knowing and willful means "'defiance' or 'knowing, conscious, and deliberate flaunting' [sic] of the Act"). An inference of a knowing and willful act may be drawn "from the defendant's elaborate scheme for disguising" his or her actions. *United States v. Hopkins*, 916 F.2d 207, 214-15 (5th Cir. 1990).

Carney has had a lengthy career in politics and it is reasonable to infer that he was aware of the Act's contribution limits and prohibitions against corporate contributions. Carney's profile on Norway Hill's website states that he brings "the experience of more than sixteen years of public and private work," and describes his positions in the New Hampshire State House, in the White House as a Special Assistant and Director of Political Affairs, and at the National Republican Senatorial Committee. Principal Profiles, <http://www.norwayhill.com/Bios/DMCbio.htm> (visited Nov. 5, 2004). As further indication of Carney's familiarity with the Act's prohibition of corporate contributions, Carney was a

1 complainant in MUR 4000 (Fisher) and a witness in a prior enforcement matter, MUR 3774
2 (NRSC)—both involving prohibited corporate contributions.²⁴

3 Given his familiarity with the Act, Carney could well have recognized the serious
4 questions posed by corporate spending for petition-gathering activity on behalf of a Federal
5 candidate. This inference is consistent with Carney's reported statement that if Norway Hill's
6 efforts turned out to be a donation, "I'd have to report that. I haven't figured out, yet, if it's a
7 personal contribution on our behalf or an in-kind contribution to the foundation. We haven't
8 worked that out yet." See John DiStasio, *Names Sought to Get Nader on Ballot*, Manchester
9 Union Leader, Aug. 10, 2004. Moreover, considering Choices for America's complete denial of
10 any involvement in this matter, and Carney's apparent disavowal of his statements regarding that
11 organization, it appears that respondents reimbursed Norway Hill only when the activities at
12 issue came to light in the press and a complaint was filed with the Commission.²⁵ Thus, we
13 recommend the Commission include the knowing and willful element at this stage in order to put
14 Carney on notice that the Commission is examining his conduct to determine whether it was
15 indeed knowing and willful.

16 Lauren Carney and James McKay may also have knowingly and willfully violated the
17 Act. David Carney did not act alone in "hiring" Norway Hill and using corporate funds to pay
18 for the activity at issue: these respondents appear to have been equally involved, if not with the

²⁴ Carney alleged in the complaint generating MUR 4000 (Fisher) that respondents violated 2 U.S.C. § 441b, specifically stating, "Section 441b prohibits any corporation from making a 'contribution or expenditure' in connection with the election of any federal candidate" Carney/NRSC Complaint in MUR 4000. Moreover, during his deposition in MUR 3774 (NRSC), Carney stated, "well, we could only use soft money in certain things. So we always had excess of corporate funds, almost always. So, you know, with very strict requirements. There was always corporate money" MUR 3774, Carney Dep. Tr. at 125:8-13.

²⁵ If Carney's initial statements regarding Choices for America (assuming they were reported accurately in the press) were not, as it appears, truthful, these statements can be read as an attempt to disguise the transactions at issue—lending weight to the inference that the alleged violations at issue were knowing and willful.

1 decision to spend corporate funds, then with the subsequent reporting of the amounts as
2 contributions after Norway Hill's activities came to light in the press and after the complaint in
3 MUR 5513 was filed.²⁶

4 Respondents' eventual characterization of the activity as individual contributions from
5 the three principals suggests at least two plausible explanations: that respondents recharacterized
6 transactions they knew were illegal only after the corporation's spending was publicly revealed;
7 or that they were attempting to remedy their error when they learned that the activity may have
8 violated the Act. *See Hopkins*, 916 F.2d at 214-15. Because both inferences are possible, we
9 recommend the Commission find reason to believe Norway Hill knowingly and willfully
10 violated the Act by making prohibited corporate contributions to the Nader Committee, and that
11 David Carney, Lauren Carney, and James McKay knowingly and willfully violated the Act by
12 consenting to the making of those contributions. 2 U.S.C. § 441b(a).²⁷

13 With regard to the Nader Committee, complainants submit little in the way of evidence to
14 suggest that the Committee knew Carney would use corporate funds to pay for signature
15 gathering activity. In its response, the Nader Committee states, "the campaign was unaware that
16 Mr. Carney had hired Norway Hill because it had assumed Mr. Carney was a volunteer using his
17 own time to assist the campaign." Nader Response in MUR 5513 at 2. In fact, when Norway
18 Hill's involvement came to light, the Nader Committee did what it could to remedy the situation.
19 The Committee's counsel and campaign manager contacted Carney, requested an accounting of

²⁶ Lauren Carney also appears to be a sophisticated political player. Before joining Norway Hill in 1993, she served for four years as the Deputy Political Director of the Republican National Committee. <http://www.norwayhill.com/Bios/HLZCbio.htm> (first visited Nov. 5, 2004). Norway Hill's website states that Ms. Carney "has worked professionally on all levels of Republican campaigns since 1982." *Id.* A search revealed no information about James McKay, the "owner" of Norway Hill Associates.

²⁷ While we recognize that the available information does not implicate Lauren Carney or James McKay to the same degree as David Carney, we make knowing and willful recommendations as to these respondents in the interest of providing them fair notice that their conduct potentially could be viewed as knowing and willful.

1 Norway Hill's expenses, and paid for the outstanding amount. However, we leave open the
2 possibility that information obtained during an investigation will reveal that prior to the press
3 reports the Nader Committee was aware of Norway Hill's involvement. Thus, we recommend
4 the Commission take no action at this time with respect to the Nader Committee.

5 As discussed above, no information suggests that Choices for America had any
6 involvement in the facts at issue here. Accordingly, we recommend that the Commission find no
7 reason to believe that Choices for America violated the Act in connection with this matter.

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MICHIGAN FACT PATTERN

MURs: 5533 and 5581
Respondents: Nader for President 2004 and
Carl M. Mayer, in his official capacity as treasurer
Michigan Republican State Central Committee and
Richard M. Gabrys, in his official capacity as treasurer
Greg McNeilly

I. INTRODUCTION

Complainants in the Michigan fact pattern allege that the Michigan Republican State Central Committee ("MRSC") violated the Act in connection with its efforts to gather petitions to place Ralph Nader on the Michigan ballot during the 2004 Presidential election cycle. We recommend that the Commission find reason to believe MRSC violated the Act in connection with its petition-gathering activities, and seek authorization to conduct an investigation with respect to expenses MRSC incurred. Pending the results of that investigation, we recommend the Commission take no action at this time with respect to the Nader Committee in connection with this fact pattern. Finally, we recommend the Commission find no reason to believe Greg McNeilly violated the Act with respect to this matter.

II. FACTUAL AND LEGAL ANALYSIS

Under Michigan law, in order to qualify for the ballot, an independent candidate for President in 2004 was required to submit a petition containing the signatures of at least 30,000 electors by July 15, 2004. *See Mich. Comp. Laws § 168.1 et seq.* During that election cycle, MRSC undertook an effort to gather enough signatures to place Ralph Nader on the Michigan ballot. A July 8, 2004 email from respondent Greg McNeilly, then Executive Director of MRSC, to "Republican Leaders" states, "we need to assist efforts to provide Ralph Nader access to

1 Michigan's ballot," and asks recipients to print out and sign a petition and turn it in to any of
2 MRSC's "Victory Centers" around the state. Complaint in MUR 5533, Exhibit A.

3 On July 15, 2004, the deadline to file 30,000 signatures, the Nader Committee filed only
4 5,463.³⁹ *DeLeeuw v. State Board of Canvassers*, 688 N.W.2d 847, 849 (Mich. Ct. App. 2004).⁴⁰
5 However, MRSC field director, Nick DeLeeuw, separately filed an additional 45,040 signatures
6 collected as a result of MRSC's efforts. The Michigan Secretary of State reviewed the signatures
7 and concluded that there were a sufficient number of facially valid signatures to include Nader
8 on the Michigan ballot. However, the Michigan Democratic Party challenged the petition,
9 asserting that the MRSC-collected signatures could not be counted as part of the candidate's
10 petition. The Michigan Board of Canvassers heard the challenge, but deadlocked in attempting
11 to reach a decision. MRSC filed a writ of mandamus with the Michigan Court of Appeals to
12 force the Board of Canvassers to act, and the court eventually issued an order compelling the
13 Board to certify the petition, including MRSC's signatures. *Id.*

14 In MUR 5533, complainant (the Executive Chair of the Michigan Democratic Party)
15 alleges that the costs associated with MRSC's petition-gathering efforts constitute an excessive
16 in-kind contribution to the Nader Committee in violation of 2 U.S.C. § 441a(a). Complainant
17 further alleges that MRSC did not report its contributions in violation of 2 U.S.C. § 434(b), and
18 that the Nader Committee accepted the excessive contributions in violation of 2 U.S.C. § 441a(f).
19 As to the petition-gathering costs, we recommend the Commission find reason to believe MRSC
20 violated the Act by misreporting these transactions. As to the legal expenses, we recommend the

³⁹ The Nader Committee's response indicates that although it knew it would not meet the required amount of signatures, the Committee filed the amount it had in order to provide a basis to request an extension of the filing deadline. Nader Response in MUR 5533 at 4.

⁴⁰ The cited Michigan Court of Appeals decision sets forth many of the relevant facts in this matter and will be referred to throughout this discussion.

1 Commission find reason to believe MRSC violated the Act by failing to report these expenses,
2 and reason to believe these expenses constitute an excessive contribution.

3 **A. MRSC Liability for Petition-Gathering**

4 Complainants allege that the costs associated with MRSC's petition-gathering efforts
5 constitute a coordinated in-kind contribution to the Nader Committee. The available information
6 indicates that MRSC may have made an in-kind contribution to the Nader Committee, but is
7 equivocal as to whether the Nader Committee knowingly accepted the contribution.

8 Amounts spent on promoting a candidate for the general election ballot "by seeking
9 signatures on nominating petitions" are expenditures. Advisory Opinion 1994-5 (White)
10 ("[E]xpenditures to influence your election would include amounts you spend . . . to promote
11 yourself for the general election ballot by seeking signatures on nominating petitions."). MRSC
12 does not contest that the amounts spent for its petition gathering efforts were expenditures, but
13 states that it paid for these costs "100% from [its] Federal Account" and reported them as such to
14 the Commission. Indeed, MRSC reported \$4,717 in expenditures for "Travel, Food, Lodging,"
15 and "Petition Collection Pay."⁴¹ Attachment 5. The party assumed, however, that because its
16 expenditures were not coordinated with the Nader Committee, the costs could not be
17 contributions and were, instead, independent expenditures. Accordingly, MRSC reported these
18 expenditures on Schedule E (Itemized Independent Expenditures) of its August and September
19 2004 Monthly Reports. Attachment 5.

⁴¹ There is some discrepancy between the reported purpose of the costs listed in MRSC's response to the complaint and those reported to the Commission. In its response, MRSC states that it incurred expenses for "travel, food, lodging, independent contractors, staff time, paper and legal expenses." MRSC Response at 1, n. 1. In its August and September 2004 monthly reports, however, MRSC reported independent expenditures for Nader for travel, food, lodging, paper, equipment rental and petition collection pay. The reports do not contain any entries for independent contractors, staff time, or legal expenses. Because costs for "independent contractors" and "staff time" could properly be described as "petition collection pay," we do not recommend the Commission pursue further the issue of this discrepancy. We address the issue of legal expenses in section II.B. of this report.

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1 MRSC's expenditures for collecting petitions and delivering them to the Michigan
2 Secretary of State on the Nader Committee's behalf are properly considered in-kind
3 contributions and not independent expenditures. An in-kind contribution is "anything of value,"
4 including the provision of goods or services without charge. 2 U.S.C. § 431(8)(A)(i); *see also*
5 11 C.F.R. § 100.52(d)(1). In contrast, an independent expenditure is an expenditure by a person
6 "expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C.
7 § 431(10)(A), *see also* 11 C.F.R. § 100.16(a). Thus, while contributions are broadly defined to
8 include "anything of value," independent expenditures only reach payments for communications
9 and those communications must include express advocacy. In this case, MRSC delivered
10 valuable goods in the form of signatures on ballot access petitions to the Michigan Secretary of
11 State on behalf of the Nader Committee. Without them, Nader would not have appeared on the
12 Michigan ballot. The signatures MRSC obtained and the petitions it delivered were not
13 communications. They were not broadcast over radio or television; they were not reprinted in
14 the newspapers; they were not posted as campaign flyers or signs. Moreover, they were not
15 vehicles for express advocacy. Instead, these petitions were a filing required by state law for
16 qualification for inclusion on the ballot. In this sense, they were akin to the delivery of a good or
17 service by a third-party to a committee -- a classic direct in-kind contribution.

18 The Act allows multicandidate political committees like MRSC to contribute \$5,000 to
19 the authorized committee of a candidate. 2 U.S.C. § 441a(a)(2)(A). Thus, in spending \$4,717 on
20 its petition-gathering efforts, MRSC did not make an excessive contribution, but apparently
21 violated 2 U.S.C. § 434(b)(4)(H)(i) by reporting its expenses as independent expenditures rather
22 than contributions. MRSC states that it sought the Commission's aid, "[g]iven the novelties of
23 correctly reporting these expenses." MRSC Response at 4; *see also* Attachment 6. Indeed, in a

1 July 27, 2004 email to the Reports Analysis Division ("RAD"), Henrietta Tow, MRSC's head of
2 accounting, wrote, "the Michigan Democrat[s] are constantly in the paper talking about filing
3 complaints with the FEC regarding this matter. I want to make sure that I am reporting the
4 disbursements how I should be." Attachment 6. RAD responded that it was unclear how the
5 activity should be reported, but suggested the Committee seek an advisory opinion.⁴² MRSC did
6 not seek an Advisory Opinion, but in light of its other apparent good faith efforts to disclose its
7 Nader ballot access efforts, our later disposition recommendations will focus on MRSC
8 amending its reports rather than necessarily seeking a penalty for its apparent reporting violation.

9 **B. MRSC Liability for Petition-Related Legal Expenses**

10 Though MRSC admitted it incurred legal expenses, it does not appear to have reported
11 those expenses. See MRSC Response at 1, n.1. Because MRSC's legal expenses would
12 constitute a contribution, we recommend the Commission find reason to believe MRSC violated
13 the Act by failing to report these amounts. 2 U.S.C. § 434(b). Although we do not know the
14 amount of the legal expenses incurred, given the very small difference between the contribution
15 limit of \$5,000 and the in-kind contribution, it is quite possible that the legal expenses would
16 result in total contributions over \$5,000. In order to investigate the cost of the legal services, we
17 further recommend the Commission find reason to believe MRSC made excessive in-kind
18 contributions to the Nader Committee in violation of 2 U.S.C. § 441a(a)(2)(A).

19 The Act defines contributions and expenditures as the provision of something of value
20 "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(8)(A) and

⁴² According to a RAD Communication Log of the August 5, 2004 conversation, MRSC indicated that it would likely request an Advisory Opinion, but asked for guidance as to how the activity should be reported prior to receipt of an Advisory Opinion. While MRSC would not have been able to obtain an Advisory Opinion before the filing deadline for its August report, it could have amended that report to incorporate an Advisory Opinion it received after the filing deadline. RAD responded that the amounts in question might either have constituted an in-kind contribution or an independent expenditure. MRSC states that it did not receive clear guidance from the Commission, but "made its best efforts to fully report its petition-gathering activities." MRSC Response at 5.

1 (9)(A). The legal expenses at issue here were for the express purpose of siphoning votes away
2 from Presidential candidate John Kerry and thereby increasing Presidential candidate George
3 Bush's chance to win Michigan. These expenses were thus clearly for the purpose of influencing
4 the 2004 Presidential election.

5 The Commission considered the issue of legal expenses to secure ballot access in
6 Advisory Opinion 1996-39 (Heintz). There the requestor was a Republican congressional
7 candidate whose primary election nominating petitions were contested by the Michigan
8 Democratic Party and one of her Republican challengers. Just as here, the Michigan Board of
9 Canvassers deadlocked in reaching a decision on the validity of the petitions and the matter went
10 before the Michigan Court of Appeals on a writ of mandamus. Heintz asked the Commission,
11 *inter alia*, whether she could set up a separate account to pay for legal expenses incurred in
12 defending her nominating petitions against the challenge. The Commission advised Heintz that
13 "funds received and spent to pay for the expenses described in your request would not be treated
14 as contributions or expenditures for purposes of the Act, provided they are raised and spent by an
15 entity other than a political committee." AO 1996-39 (Heintz); *see also* AO 1982-35 (Hopfman)
16 (legal expenses incurred in filing suit challenging state party rule that would deny candidate
17 access to state party convention not for the purpose of influencing an election); AO 2003-15
18 (Majette) (legal expenses incurred in defending against defeated opponent's challenge to state
19 primary election system not for the purpose of influencing an election). The Commission
20 considered such expenses a "condition precedent" to appearing on the ballot, and, thus, not for
21 the purpose of influencing an election. AO 1996-39 (Heintz).

22 In these opinions, however, the Commission has drawn a distinction between "preventing
23 the electorate from voting for a particular opponent" and "defending one's own ballot position."

1 AO 1996-39 (Heintz) at n.3. (citing AO 1980-57 (Bexar County Dems.)). In AO 1980-57 (Bexar
2 County Dems.), the Commission found that amounts spent on challenging an opponent's
3 petitions constituted expenditures because they were for the purpose of influencing an election.
4 The Commission stated, "a candidate's attempt to force an election opponent off the ballot so
5 that the electorate does not have an opportunity to vote for that opponent is as much an effort to
6 influence an election as is a campaign advertisement derogating that opponent." *Id.*

7 Though MRSC's legal expenses were incurred in defending the sufficiency of
8 nominating petitions, its petitions were not in support of its own candidate's ballot access, and,
9 thus, not a condition precedent to its candidate participating in the election. Instead, MRSC
10 submitted petitions for a third-party candidate. While MRSC's email request to "Republican
11 Leaders" was couched in terms of ensuring "option and choice," the goal of the party was clear.
12 MRSC stated, "In 2000, Ralph Nader got 1.8% of the vote in Michigan . . . [but is] currently
13 pulling 4% of Michigan voters. . . . Michigan Democrats today announced that they fear Ralph
14 Nader's access to the ballot will prevent John Kerry from winning Michigan. . . . The election
15 will be close . . . we need to assist efforts to provide Ralph Nader access to the Michigan ballot."
16 Complaint at Exhibit A. Because MRSC was not defending its candidate's ballot position, but
17 was attempting to influence the election, its legal expenses constitute a contribution and an
18 expenditure. 2 U.S.C. §§ 431(8)(A), (9)(A).

19 Though MRSC admits that it incurred legal expenses associated with its petition-
20 gathering efforts, MRSC Response in MUR 5533 at 1, n.1, it did not disclose those expenses.
21 Accordingly, we recommend the Commission find reason to believe MRSC violated 2 U.S.C.
22 § 434(b) by failing to report the legal expenses associated with its petition-gathering activities.
23 As stated above, MRSC has already reported \$4,717 in amounts that should have been reported

1 as contributions to the Nader Committee—just \$283 short of the \$5,000 limit. As such, we also
2 recommend the Commission find reason to believe MRSC violated 2 U.S.C. § 441a(a)(2)(A) by
3 making excessive in-kind contributions to the Nader Committee.

4 Though complainants identified Greg McNeilly (former Executive Director of the
5 Michigan Republican Party) as a respondent, complainants make no specific allegations as to
6 how he may have violated the Act. Thus, we recommend the Commission find no reason to
7 believe Greg McNeilly violated the Act in connection with this matter.

8 **C. Nader Committee Liability**

9 Complainants assert that MRSC acted as an agent of the Nader Committee when it
10 collected and filed petitions to put Nader on the ballot in Michigan; that MRSC's knowledge of
11 the cost of its petition efforts can be imputed to the Nader Committee; and that as a result, the
12 Nader Committee knowingly "accept[ed] excessive in-kind contributions and fail[ed] to report
13 them." Complaint in MUR 5533 at 3; Complaint in MUR 5581 at 7, ¶22; *see also* 2 U.S.C.
14 § 441a(f).

15 The available information indicates that the Nader Committee was aware of MRSC's
16 efforts, however, it also indicates that, at least initially, the Nader Committee opposed them.
17 Indeed, before the Michigan Board of Canvassers, the Michigan Democratic Party argued that
18 the Nader Committee "expressly disclaimed" MRSC's signatures. MRSC Response, Exhibit 1 at
19 8-9; *see also* Nader Response in MUR 5533 ("the Nader campaign took extraordinary steps to
20 distance itself from the Republican signature gathering and undertook no measures to adopt in
21

any manner any signatures gathered by Republican volunteers”) (emphases omitted).⁴³ The Nader Committee argues that it did not violate the Act because MRSC’s activities “appear to have been wholly volunteer and unpaid, and, as such, would be exempt as contributions” Nader Response at 1.⁴⁴ In support of its argument, the Nader Committee points to the July 8, 2004 MRSC email, discussed above, that stated, “while the Michigan Republicans are expending no funds to assist Nader’s efforts, we are seeking volunteer help to ensure Nader’s ballot access.” Complaint in MUR 5533 at Exhibit A. In addition, MRSC filed reports disclosing its spending but not until after the relevant activity took place.⁴⁵

Complainants’ theory is that although MRSC’s petition-gathering efforts were wholly distinct from the Nader Committee’s, the Nader Committee “ratified” MRSC’s actions, rendering MRSC the Nader Committee’s agent, thereby allowing its knowledge to be imputed to the Nader Committee so that the Nader Committee could be said to have knowingly accepted the contribution. This reasoning is apparently based on a statement in the Michigan Court of Appeals decision on a subsidiary standing issue. In that proceeding, the Michigan Democratic Party argued that plaintiff, Nick DeLeeuw, did not have standing because Michigan law allowed only a candidate or his authorized agents to file a petition and seek relief in court related to those petitions. In response, MRSC contended that the Nader Committee ratified its actions by not

⁴³ The Michigan Democratic Party’s Petition Challenge, filed with the Michigan Board of Canvassers, indicates that on June 15, 2004, the petition due date, MRSC filed its Nader petitions with the Michigan Secretary of State before the Nader Committee filed its own petitions. See MRSC Response at Exhibit 1 at 8-9. Thus, when the Nader Committee’s representative arrived to file the Committee’s petitions, she was told that her filing would be considered a “supplement” to the MRSC’s. After consulting with the Committee, the representative allegedly “refused to acknowledge that her filing was supplemental to the Republican Party filing, and refused to accept a receipt of filing so stating.” *Id.*

⁴⁴ The value of services provided without compensation by an individual who volunteers on behalf of a candidate or political committee is specifically excluded from the definition of contribution. See 2 U.S.C. § 431(8)(B)(i).

⁴⁵ The petitions were filed on July 15, 2004 while the MRSC reported its first disbursements for petition-gathering on August 20, 2004 in its August Monthly Report.

1 taking steps to stop the activity. While the court was not convinced that the statute at issue had
2 an agency requirement, it stated in *dicta* that "even if the statute is interpreted as including an
3 agency requirement, it was met here." *DeLeeuw*, 688 N.W.2d at 851.

4 The totality of the circumstances leads us to recommend the Commission take no action
5 at this time with respect to the Nader Committee's potential acceptance of MRSC's contribution,
6 pending the results of the proposed investigation. On the one hand, the Nader Committee
7 accepted the MRSC petitions and benefited from them in that Nader was included in the
8 Michigan ballot. Moreover, the Nader Committee was aware of MRSC's activity while it was
9 ongoing. Finally, as just noted, the Michigan Court of Appeals has said (albeit in *dicta*) that by
10 ratification, MRSC became the Nader Committee's agent and that would allow imputation of its
11 knowledge to the Nader Committee. On the other hand, the Nader Committee appears to have
12 believed in good faith MRSC's initial description of its petition-gathering efforts as volunteer
13 activity; the Nader Committee originally disclaimed MRSC's petitions; there is no evidence of
14 cooperative communication between the two committees regarding the filing of the petitions; and
15 there is no information that the Nader Committee knew that MRSC was paying for the petition-
16 gathering activity and litigation or how much. Thus, even if the Nader Committee could be said
17 to have knowingly accepted MRSC's contribution -- an issue we need not resolve at this point --
18 this record, without more, would lead us to recommend the Commission exercise its
19 prosecutorial discretion and not pursue the Nader Committee. We leave open the possibility,
20 however, that in the course of investigating MRSC's legal expenses, we might discover that the
21 Nader Committee's knowledge of MRSC's activities was greater than it now appears. Thus, we
22 recommend that the Commission take no action at this time with respect to the Nader
23 Committee.

RECOMMENDATIONS

MUR 5489 (OREGON):

1. Find no reason to believe Citizens for a Sound Economy, Inc. n/k/a FreedomWorks, Inc. violated 2 U.S.C. § 441b.
2. Find no reason to believe Russ Walker violated the Act with respect to this matter.
3. Take no action against the Oregon Family Council for any potential violation of 2 U.S.C. § 441b.
4. Take no action and close the file with respect to Tim Nashif.
5. Take no action and close the file with respect to Michael White.
6. Find no reason to believe Nader for President 2004 and Carl M. Mayer, in his official capacity as treasurer, violated the Act with respect to this matter.

- 1 7. Find no reason to believe Bush-Cheney '04 and David Herndon, in his official
2 capacity as treasurer, violated the Act with respect to this matter.
3
- 4 8. Find no reason to believe Steve Schmidt violated the Act with respect to this
5 matter.
6
- 7 9. Find no reason to believe the Oregon Republican Party and Charles Oakes, in his
8 official capacity as treasurer, violated the Act with respect to this matter.
9
- 10 10. Find no reason to believe Kevin Mannix violated the Act with respect to this
11 matter.
12
- 13 11. Approve the appropriate letters.
14
- 15 12. Close the file in MUR 5489.
16

17 **MUR 5513 (NEW HAMPSHIRE):**

- 18 13. Find reason to believe Norway Hill Associates, Inc., David Carney, Lauren
19 Carney, and James McKay knowingly and willfully violated 2 U.S.C. § 441b.
20
- 21 14. Find no reason to believe Choices for America, LLC violated the Act in
22 connection with this matter.
23
- 24 15. Take no action at this time with respect to Nader for President 2004 and Carl M.
25 Mayer, in his official capacity as treasurer.
26
- 27 16. Approve the attached Factual and Legal analyses.
28
- 29 17.
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MUR 5533 (MICHIGAN):

26. Find reason to believe the Michigan Republican State Central Committee and Richard M. Gabrys, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(a)(2)(A).
27. Take no action at this time with respect to Nader for President 2004 and Carl M. Mayer, in his official capacity as treasurer.
28. Find no reason to believe Greg McNeilly violated the Act in connection with this matter.
29. Approve the attached Factual and Legal Analysis.
- 30.

SEVERANCE:

31. Sever the allegations and respondents relating to the Oregon fact pattern out of the Complaint in MUR 5581 and add these allegations and respondents to MUR 5489.
32. Close the file in MUR 5489.

- 1 33. Sever the allegations and respondents relating to the Michigan fact pattern out of
2 the Complaint in MUR 5581 and add these allegations and respondents to MUR
3 5533.
4
5 34. Sever the allegations and respondents relating to the New Hampshire fact pattern
6 out of the Complaint in MUR 5581 and add these allegations and respondents to
7 MUR 5513.
8
9

10 Lawrence H. Norton
11 General Counsel

12
13 6/2/05
14 Date

15 BY: Rhonda J. Vosdigh
16 Rhonda J. Vosdigh
17 Associate General Counsel

18 Jonathan A. Bernstein
19 Jonathan A. Bernstein
20 Assistant General Counsel

21 Beth Mizuno
22 Beth Mizuno
23 Attorney

24
25
26
27
28
29 **ATTACHMENTS**

- 30
31 1. Articles of Amendment to the Articles of Incorporation for Citizens for a Sound
32 Economy, Inc. n/k/a FreedomWorks, Inc.
33 2. Application for a Certificate of Authority to Transact Business in Virginia by Citizens for
34 a Sound Economy, Inc. n/k/a FreedomWorks, Inc.
35 3. CSE/FreedomWorks, Inc. Articles of Merger.
36 4.
37 5. Relevant sections of the MRSC's August and September 2004 monthly reports.
38 6. July 27, 2004 email from MRSC's head of accounting, Henrietta Tow, to RAD, and RAD
39 Communication Logs.
40 7. MUR 5513 (New Hampshire) Factual and Legal Analyses (4)
41 8.
42 9. MUR 5533 (Michigan) Factual and Legal Analysis (1)